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6 **BEFORE THE STATE OF WASHINGTON**
7 **ENERGY FACILITY SITE EVALUATION COUNCIL**
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11 IN RE APPLICATION NO. 99-1
12 SUMAS ENERGY 2
13 GENERATION FACILITY
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COUNSEL FOR THE
ENVIRONMENT'S
MOTION IN SUPPORT
OF WHATCOM COUNTY'S
MOTION FOR
RECONSIDERATION

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18 Counsel for the Environment supports the motion made by Intervenor Whatcom
19 County requesting that the EFSEC reconsider its Order No. 757 on the issue of creation of an
20 extra legal process for the filing of yet another revised application under the nomenclature of a
21 new or revised application (order page 12)¹.
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24 ¹ It is not clear what the EFSEC is labeling the new document. On page 12 the order refers to new
application, revised application and revised proposal.

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1 Counsel for the Environment applauds the EFSEC's effort to attempt to be responsive
2 to the pressures associated with the NW energy situation, but it needs to be mindful that as a
3 creature of statute it has only those powers conferred by statute either expressly or by
4 implication. Further, its power to fashion an administrative remedy is limited by statute.
5 Skagit Surveyors and Engineers LLC v Friends of Skagit Co., 135 Wn.2d 542, 958 P.2d 962
6 (1998). In addition, as these proceedings are governed by the Administrative Procedure Act
7 (APA), all parties must ensure that the record can support whatever decision is ultimately made
8 on review.

9 Here, EFSEC has appropriately concluded that its authority is limited to the provisions
10 of RCW 80.50.100. Counsel for the Environment, however, disagrees that it can be construed
11 to allow for a supplementation of the existing record with limited public participation.

12 Once the recommendation is made, the only option is transfer to the Governor. EFSEC
13 current rules only contemplate a revision of the application post hearing to conform to the
14 evidence at hearing. WAC 463.42.690(3). To suggest that withdrawal of the existing revised
15 application and filing of a new one either circumvents the WAC or rekindles the grounds for
16 reconsideration is difficult to fathom.

17 Taking this concept to its logical conclusion, if Sumas Energy 2 is allowed to file a new
18 application, it renders the prior one and the record obsolete. Clearly, this is the scenario
19 contemplated by RCW80.50.100(3). This provision treats a denial of an application as one
20 without prejudice and allows re-filing, unlike the scenario contemplated in RCW
21 80.50.100(2)(c) which authorizes the supplementation of the existing record when the
22 Governor wishes the EFSEC to reconsider certain aspects of a "draft certification agreement."
23 Had the legislature contemplated allowing supplementation instead of creation of a new record,
24 it would not have made the two provisions distinct.

1 EFSEC's interpretation ignores the legislative scheme set forth in RCW 80.50.100(2)
2 & (3). It construes the language of RCW 80.50.100(3) to be meaningless insofar as it invents
3 an option for a new application, while using the existing record under a statutory scheme,
4 which explicitly applies once the original application is denied by the Governor. EFSEC
5 cannot construe a statute so as to render language meaningless. State v Haddock, 141Wn.2d,
6 103, 112 (2000).

7 In addition to the sequence of events contemplated by the recommendation process,
8 RCW 80.50.100(3) makes clear that the applicant is limited in its options following a denial.
9 An applicant may only file an application for the same site based on changed conditions or new
10 information. The applicant cannot, for example, submit the same application to an EFSEC
11 whose membership has changed in hopes that there would be enough votes to change the
12 result.

13 Both of these points make clear that the legislature contemplated a process, which is
14 not reflected in the EFSEC order. The EFSEC correctly concluded that reconsideration was
15 not the proper method to address the applicant's changed position. The EFSEC lacks the
16 statutory authority to make up a new process and supplement a closed record contrary to
17 Chapter 80.50 RCW or RCW 34.05.562.

18 The APA also has no provision which allows for supplementation of the record in this
19 manner. RCW34.05.562 . Similarly EFSEC's statute for court review limits the options.
20 RCW 80.50.140(1)(d). None are satisfied by the option offered in Order 757.

21 EFSEC appears to be treating the proceedings as an amendment of a site certification
22 under WAC 463.36.030. If this were the status of the project, the EFSEC would have made
23 findings on the merits in the context of the application as a whole. The amendment process
24 contemplates the same level of public participation and notice. However, here EFSEC

1 suggests that there will be an expedited process and limited public process as it pertains to the
2 water and air permits. Further, it fails to acknowledge the implications of how the substantive
3 changes offered by the applicant in its petition for reconsideration impacts the project as a
4 whole. Unlike an amendment, which seeks to change a distinct component of the approved
5 project, the EFSEC is in essence allowing the applicant to file a new application without
6 conforming to the requirements of a new application.

7 As Counsel for the Environment, I am interested in ensuring that the principles of RCW
8 80.50.010 are met. In order to do this, the public cannot be marginalized in the process.
9 Limiting their participation by not allowing full public hearings on the proposed changes will
10 limit their voice. In addition, creating a process which is not contemplated by the governing
11 statutes runs the risk that further public funds will be expended when a reviewing court finds
12 that EFSEC exceeded its statutory authority.

13 Furthermore, where the administrative agency is quasi-judicial and its proceedings
14 impact not only the applicant but also other parties and the public, the agency must factor in
15 the prejudice to the other parties to the proceedings by allowing a process, which lacks finality.

16 Here, the applicant has already had an opportunity to make a record. EFSEC properly
17 denied reconsideration of the existing record and found that it was too late to add new
18 information. Order 757 then ignores this reality and allows reconsideration or remand based
19 on a revised application. The latitude an agency has to remand a matter to itself for further
20 fact-finding in an individual licensing matter is not present here. The courts would view it
21 similarly. The proceedings must be commenced anew.

22 In sum, Counsel for the Environment supports Intervenor Whatcom County's Motion
23 for Reconsideration. The EFSEC's order authorizing filing of a new application/revised
24 application and expediting processing exceeds EFSEC's authority and prejudices the parties

1 and the public by creating a process which does not allow for full development of a new record
2 based on a new proposal for the same site.

3 DATED this _____ day of May, 2001.

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